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No. 85-465

Supreme Court, U.S.
FILED
OCT 19 1985
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MOUNTAIN PLAINS CONGRESS OF SENIOR ORGANIZATIONS; MR & MRS. HUGH A. GROVES; FRANCIS SEELY; ESTELLE WHITTLE; HENRY WHITTLE; MR. & MRS. BURTON W. ATKINSON; MR. & MRS. C.E. DIETRICH; HARRIET MILLER; and ALICE VAN LANDINGHAM,

Petitioners,

v.

NATHAN MALCHMAN, GERTA CONWAY, WILLIAM DEAUTRIELL and LOUIS STONE,

Plaintiffs-Respondents,

and

LEONARD DAVIS, SOPHIE DAVIS, COLONIAL PENN GROUP, INC., COLONIAL PENN FRANKLIN INSURANCE COMPANY, INTRAMERICA LIFE INSURANCE COMPANY, NATIONAL ASSOCIATION PLANS, INC., AMERICAN ASSOCIATION OF RETIRED PERSONS, NATIONAL RETIRED TEACHERS ASSOCIATION, CARRIE B. ALLEN, ORANDA BANGSBERG, BERNARD BERGGREN, JUNE BIGGAR, ARTHUR BOUTON, OLAF KAASA, CLARA L. KLEWENO, FLOYD E. TUMBLESON, J. LEONARD JOHNSON, C.E. CARMICHAEL, AMERICAN ASSOCIATION OF RETIRED PERSONS INSURANCE TRUST, DOROTHY M. CRIPPEN, JAMES J. BROWNING, LLOYD I. SINGER, CYRIL F. BRICKFIELD and JOHN J. MACWILLIAMS,

Defendants-Respondents.

PLAINTIFFS-RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that petitioners failed to make a clear showing that the District Court abused its discretion in rejecting petitioners' contention that plaintiffs are not adequate class representatives because of their familial or other relationship with class counsel, where it is undisputed that several plaintiffs had no such relationships and where, moreover, the record shows that plaintiffs are adequate class representatives in every respect?

2. Whether the Court of Appeals correctly held that petitioners failed to make a clear showing that the District Court abused its discretion in approving the settlement after tentative certification of an enlarged class, where (a) petitioners abandoned their contention that tentative certification was improper, (b) all issues which could have been raised at the time of tentative certification were raised and litigated by petitioners, and (c) there is no conflict of interest between members of the enlarged class and members of the original class but, rather, all class members share common interests?

3. Whether the Court of Appeals correctly held that petitioners failed to make a clear showing that the District Court abused its discretion in rejecting petitioners' contention that fee negotiations before and during settlement negotiations tainted the settlement, where (a) the record shows that fee negotiations occurred only after "a framework of settlement on the merits had been agree to" (22a), and (b) defendants had a legitimate interest in negotiating the amount of the fees because payment of the fees came from defendants and not from a settlement fund?

4. Whether the Court of Appeals correctly held that petitioners failed to make a clear showing that the District Court abused its discretion in rejecting petitioners' contention that they are entitled to unlimited discovery and an evidentiary hearing even though they failed to make "cogent factual objections" to the settlement?

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STATEMENT OF THE CASE

A. *Nature of the Action*

This brief in opposition is submitted by those respondents who are the plaintiffs below.

This class action, and a companion state class action in the Supreme Court of the State of New York entitled *Conway v. Davis*, were the first and only actions ever to challenge the relationship between Colonial Penn Group Inc. ("CPG") and the American Association of Retired Persons ("AARP") (then composed of over 10 million persons aged 65 or older). This litigation (this federal action and companion state action) was originally brought on behalf of approximately 2.5 million AARP members who had purchased group health insurance underwritten by CPG and endorsed by the AARP (45a, 46a, 52a)*. In essence, plaintiffs alleged that CPG dominated and controlled the Associations (AARP and an affiliated organization, the National Retired Teachers Association ("NRTA") and used them as a vehicle to sell its products, particularly group health insurance, based on allegedly independent endorsements by the Associations.

The facts alleged and relief sought in the federal and state complaint were substantially identical (46a). The state action was based upon claims of fraud and breach of fiduciary duty while the federal action was based on claimed violations of the federal antitrust laws (46a).

From its inception, this litigation has sought only injunctive and declaratory relief (45a). Experienced class counsel made the considered judgment not to seek monetary damages because of the prohibitive cost of giving individual notice to a class composed of 2.5 million members and also because a suit for damages on behalf of the class would have involved millions of small claims ("considerably less than $32.40 per year" (58a)) by individual class members, a very substantial proportion of whom, being older

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* Numbers in parentheses preceding "a" refer to pages of the appendices of the petition; numbers following "A" refer to the Record on Appeal in the Court of Appeals; numbers without a letter prefix or suffix refer to pages of the petition.

persons, might be deceased by the time of judgment. The difficulties of proving individual damages would have been enormous, since there were 17 different AARP group health insurance plans in effect during the relevant time period (15a) and, as stated by the Court of Appeals, "a method would have been required to compare the particular mix of premiums and benefits in each plan with the premiums and benefits that a claimant hypothetically would have paid or received in the absence of alleged antitrust violations" (15a). The Court of Appeals further stated that suggestions as to how to overcome these enormous problems in the proof of individual damages "were not forthcoming from the objectors [petitioners] on remand" (15a) and, indeed, that damage claims had "no viability" (18a at n.4).

Experienced class counsel made the judgment that it would be in the best interests of the class to seek relatively expeditous injunctive and declaratory relief freeing the Associations from CPG's control, instead of becoming endlessly mired in many additional years of litigation over small individual claims. The District Court found that "it was sound judgment by plaintiffs not to assert-them [damage claims] in the complaint" (58a). It also observed that despite "ample opportunity" no one ever brought a class or derivative action for damages (63a, 64a).

B. *History of the Litigation*

The history of the litigation is succinctly set forth in the opinion of the Court of Appeals, as follows (4a-5a):

> "In 1976, litigation [was] commenced in state court in the form of a class action brought by Frieda Lederer on behalf of the class of insurance-buying members of the AARP, charging Davis, CPG, and others with fraud and breach of fiduciary duty and alleging, inter alia, that the class was overcharged for insurance policies purchased from CPG. A federal class action alleging antitrust liability was subsequently brought in October 1977, the class again consisting of the insurance-buying members of the AARP. Neither the state court nor the federal court action sought damages; rather, each sought injunctive relief to terminate the relationship between Leonard Davis and CPG, on the one hand,

and the Associations, on the other. The district court's opinion on remand now informs us that discovery was begun and basically continued in the state court action in which there was no dispute concerning the jurisdiction of the court over the fraud and breach of fiduciary duty claims with the understanding that the state court discovery would or could be used in the federal court action. We are also advised that, in response to mutual document requests, plaintiffs produced over 4,000 pages of documents and defendants over 100,000 pages of documents, of which plaintiffs made copies of over 65,000 pages. 588 F. Supp. at 1049-50 & n.1. Depositions were also taken by both plaintiffs and defendants from January 1979 through mid-May 1980, with some 66 days of testimony resulting in 11,850 pages of transcript and numerous disputes during the discovery resulting in applications to the state court.' *Id.* at 1050. Meanwhile, defendants filed a motion to dismiss the federal complaint, claiming that the action was barred by section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. §1012(b) (1982) (concerning applicability of the Sherman Act, Clayton Act, and Federal Trade Commission Act to insurance business), and that the plaintiffs lacked standing. This motion was never decided, despite the quantity of material submitted to the court, because by the spring of 1980 serious settlement negotiations were taking place, and by mid-June of 1980 the parties had requested the federal court to withold decision."

On November 3, 1980, the parties in the federal and state actions stipulated to a proposed settlement (49a). Hearings were held in early 1981 before a Referee appointed in the state action respecting the fairness and reasonableness of the settlement and respecting also plaintiffs' counsels' request for a fee award (52a). The hearings continued for six days, during which 119 exhibits by the parties and five court exhibits were received as evidence

(A221). The Referee reviewed the very extensive pre-trial discovery in this matter (*Ibid.*). Petitioners appeared at the hearing before the Referee and submitted testimony and papers in opposition (*Ibid.*). In a carefully considered and thorough report of 23 pages rendered on May 27, 1981, the Referee found the proposed settlement to be fair, adequate, and reasonable to the class, and, also, recommended the grant of plaintiffs' counsels' request for attorneys' fees (*Ibid.*)

Thereafter the state and federal courts approved a form of joint notice of the proposed settlement of the state and federal class actions to be sent in the Associations' publications (A203-7, A209-212). Distribution of the notice was effected in September, 1981 to each of the approximately 11 million class members.

On August 4, 1982, the District Court approved the settlement and stated that it agreed with the Report of the State Referee (A756). Upon appeal by petitioners, the Court of Appeals remanded to the District Court upon the ground that it was unable to affirm the District Court's approval of the settlement without that Court's analysis of several pivotal issues. Accordingly, the case was remanded for "findings" (90a) by the District Judge on several issues explicitly set forth in the Court's opinion.

On remand, the District Court approved the settlement and issued a 34-page opinion in support of its decision (43a-74a). Each of the concerns raised in the Court of Appeals prior opinion was addressed and evaluated. Upon a second appeal by petitioners, the Court of Appeals affirmed (1a-28a).

Also, by decision published on September 19, 1985, the Supreme Court of the State of New York (Mr. Justice Israel Rubin) approved the settlement (New York Law Journal, September 19, 1985, p.7, col. 1).

C. *The Enormous and Unparalleled Benefits of the Settlement*

The settlement of this litigation for injunctive and declaratory relief provides the class substantially *all* the relief sought in the

present action. The judgment herein, which shall be in force for a period of eight years, provides for the opening of the Associations' $270 million annual group health insurance business and premiums to competitive bidding (49a, 53a). The opening of the Associations' $270 million annual group health insurance business and premiums to competitive bidding has resulted in the transfer of the business from CPG to the Prudential Insurance Company of America (53a).

In addition, the judgment provides for the opening of the Associations' publications to advertising from all reputable companies, including insurance companies (instead of carrying only the advertising of CPG); reforms in the Associations' organization structure, which assure the independence and integrity of the Associations and their Trustees; the transfer from CPG of certain functions it had performed for the Associations, including the maintenance of the Associations' membership lists, with specific provision for the payment of $4.5 million for the Associations benefit; and termination of the Associations' endorsement of CPG's non-health insurance products and services such as life, automobile, homeowners and other insurance, and travel services (49a-51a).

The judgment also provides for the addition of NRTA (an affiliated organization with the same Executive Director and the same Executive Committee and about 433,000 members) as a defendant and the expansion of the class to include all members of both Associations as of November 1, 1980 (51a). (AARP and NRTA have now beeen merged into a single organization, which retained the name of AARP, and NRTA continues as a division of AARP (see footnote at A1088).) Finally, the judgment bars all monetary claims by the class members against defendants (51a).

The District Court described the unparalleled success of plaintiffs in this litigation as follows:

> "It is difficult to overstate the far-reaching results of this litigation and the settlement. Relationships between the Associations and CPG which had existed for more than 20 years came to an end. The value of those

relationships is only partly indicated by the figure of $261 million for health insurance premiums paid by AARP/NRTA members in 1977, the year the federal action was commenced. (53a)

And again:

"[O]ne thing is clear. The attack mounted by plaintiffs succeeded. The Associations have broken virtually all ties to CPG, and group health contracts and other business dealings are now dealt with by CPG on an open competitive basis. Prudential Insurance Company has replaced CPG as the group health insurer. Few class actions have ever succeeded in altering commercial relationships of such magnitude. Few class action settlements have even approached the results achieved here." (*Ibid.*)

As to the quality of representation of the class, the District Court found:

"In the present case, the attorneys representing the class have acted with outstanding vigor and dedication... (65a)

* * *

"Every issue which has come to this court has been presented by both sides with a thoroughness and zeal which has been outstanding. There has never been the slightest hint in the conduct of plaintiffs' attorneys that they were willing to sacrifice legitimate claims for an easy settlement." (66a)

ARGUMENT

Petitioners seek review of the Court of Appeals' affirmance of the District Court's discretionary approval of the settlement in this case. "The Court [of Appeals] will not overturn a district court's approval of a settlement absent a clear showing of abuse of discretion." *TBK Partner Ltd. v. Western Union Corp*, 675 F. 2d 456, 463 (2d Cir. 1982).

Notwithstanding the flamboyance – and vitriol – of petitioners' rhetoric, this is merely an attempt to transform garden-variety class action questions into issues of constitutional dimension. Petitioners' purported reasons for granting the writ present narrow questions unique to this case and involving the discretion of the District Court. There is no important question of federal law which warrants review by this Court and there is no conflict in the decisions for this Court to resolve.

All this is apart from the fact that the decision below is clearly correct.

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE NAMED PLAINTIFFS (SEVERAL OF WHOM HAD NO FAMILIAL RELATIONSHIP WHATEVER TO CLASS COUNSEL) ARE ADEQUATE CLASS REPRESENTATIVES

The basis for the petition's attack upon the adequacy of plaintiffs as class representative rests upon the misleading blanket assertion that plaintiffs had a familial or "close" relationships with class counsel.* Petitioners fail to state that there are plaintiffs in this case who had no prior relationship of any nature with class counsel. These facts deprive petitioners' contentions as to the adequacy of plaintiffs as class representatives of an even colorable basis for review by this Court.

Thus, petitioners do not refer to plaintiff William Deautriell, who is a plaintiff both in this action and in the companion state action (A223, ¶12; A600). Mr. Deautriell had no prior relationship with class counsel (10a-11a) and, as stated by the Court of Appeals, "there is no indication that he was solicited in any manner, shape or form." (11a)

Petitioners also omit to refer to plaintiff Joseph Stone, a plaintiff in the companion state action (but not in the federal action) who also had no prior relationship with class counsel. Mr. Joseph Stone was formerly for many years a Judge of the Criminal Court, City of New York and formerly also for many years the head of the Fraud Bureau in the office of Frank Hogan, District Attorney of New York County (10a, n. 1). The Court of Appeals stated that "Joseph Stone, a man of impressive credentials, was, if anything, a fiercely independent plaintiff." (10a)

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* Ironically, petitioners have failed to state that their attorney's fees and disbursements are being paid by an undisclosed third person. Also, petitioners have not stated that petitioner Mountain Plains Congress of Senior Organizations receives monies from the National Council for Senior Citizens, a competing older persons organization that is the arch rival of the Associations (A524).

Respecting plaintiff Louis Stone, whom petitioners seek to condemn as a "close friend and dining companion of ... [one] of the plaintiff's counsel" (23), Mr. Louis Stone was a vice-president of the investment banking firm of Shearson Hayden & Stone for which he wrote an investment letter (11a). The Court of Appeals characterized certain of Mr. Stone's deposition testimony as "feisty" and further stated that, "Mr. Stone testified without hestitation that it was he who first raised the subject of his becoming a plaintiff." (11a). (Mr. Louis Stone is now deceased, having died on March 16, 1985.)

Respecting plaintiff Gerta Conway (the sister of the late chauffeur for one of class counsel) (11a-12a), the Court of Appeals stated that "she testified unequivocally that no lawyer had asked her to become a plaintiff in this action." (12a)

The plaintiffs were subjected to lengthy and searching depositions. As stated by the Court of Appeals, "before settlement negotiations began, defendants had deposed the named plaintiffs at length on issues that included the ties between the named plaintiffs and class counsel" and that "defendants' questioning of plaintiffs was searching, strenuous and conducted at arms length – as evidenced by the acerbic interchanges among the parties' counsel and the defendants." (9a, 10a)

Petitioners' statement that "the courts below swept aside the need for any serious inquiry into the adequacy of the named-plaintiffs to represent the class" (22-23) is diametrically contrary to fact. After careful review of plaintiffs' depositions (10a-11a), the Court of Appeals specifically stated that "our examination of the depositions indicates that the plaintiffs ... were quite appropriate, perhaps even zealous members of the class" and that, moreover, petitioners "failed to specify a single question that would have improved upon the defendants' searching depositions of the plaintiffs." (12a)

The Court of Appeals affirmed the District Court's determination that the named plaintiffs are adequate class representatives,

stating: "In the end, the question whether named plaintiffs are adequate class representatives is one committed to the sound discretion of the district court. *See, Ingram v. Madison Square Center, Inc.*, 709 F.2d 807, 811 (2d Cir.), *cert. denied*, 104 S. Ct. 346 (1983); *Brick v. CPC International, Inc.*, 547 F.2d 185, 187 (2d Cir. 1976)." (13a)

Only one named plaintiff is sufficient to maintain a class action. E.g., *Korn v. Franchard Corp*, 456 F.2d 1206, 1209 (2d Cir. 1972). Petitioners thus seek to have this Court review, as to each of the named plaintiffs, the District Court's discretionary determination, affirmed by the Court of Appeals, that the named plaintiffs are adequate class representatives. Petitioners would thereby involve this Court in minutiae of class action certification.

There can be no serious question as to whether the requirement of adequate representation is met in this case where the settlement provides for substantially all the relief sought in the action and produces enormous and unparalled benefits for the class. The adequacy of plaintiff's representation is vindicated by what they have achieved for the class. As stated by the District Court, "the attorneys representing the class have acted with outstanding vigor and dedication" (65a) and "it hardly needs to be said that a 100% victory on the claims sued upon speaks clearly for the vigor of the advocacy" (66a). To deprive the class of the benefits of a favorable settlement upon grounds that have been rendered academic by the favorable settlement would only benefit the defendants to the detriment of the class members.

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING PETITIONERS' REMAINING ARGUMENTS AND APPROVING THE SETTLEMENT AS FAIR AND REASONABLE TO THE CLASS

As noted, the settlement approved by the District Court provides the class with enormous and unparalleled benefits and with "a 100% victory on the claim sued upon" (66a). The petition for certiorari to review this settlement not only involves no important question of federal law or conflict in decisions but also is without substance upon the merits.

A. *Petitioner's Contention That Tentative Certification Of An Enlarged Class Was Improper Is Not A Reason For Granting The Writ Because (a) Petitioners Abandoned This Contention, (b) All Issues Which Could Have Been Raised At The Time Of Tentative Certification Were Raised And Litigated By Petitioners, And (c) There Is No Conflict Of Interest Between Members Of The Enlarged Class And Members Of The Original Class But, Rather, All Class Members Share Common Interests.*

(a)

A review of petitioners' briefs in the Court of Appeals and in District Court will show that, after remand by the Court of Appeals, petitioners abandoned the issue of tentative certification of an enlarged class for settlement purposes. For this reason, neither the Court of Appeals nor the District Court discussed the tentative certification issue.

It is now too late for petitioners to raise this objection.

(b)

The objections expressed by petitioners to tentative certification of a class for settlement purposes are all based on the contention that the trial court, in certifying the class, does not have the benefit of adversarial litigation and thus may not be fully

informed as to all the surrounding facts and circumstances. (See petition, pp 27-29.) That objection is inapplicable to this case, because petitioners herein strenuously litigated all issues relating to class certification and all their contentions were rejected after careful examination by the courts below.

For example, petitioners objected to the adequacy of the named plaintiffs as class representatives, which objections were rejected by the courts below for the reasons discussed (*supra*, pp. 8-10).

Petitioners also objected to the enlargement of the class, originally defined as the 2.5 million members of AARP who purchased group health insurance from CPG (¶21 at A11), to include all 11 million members of AARP and its affiliated organization, NRTA (51a, 52a). Such objections were carefully considered, discussed and rejected in the opinions of both the District Court (66a-77a) and Court of Appeals (13a). The discretionary determination of the District Court to certify the enlarged class was thus made in an adversial context, as was the decision of the Court of Appeals affirming such discretionary determination of the District Court.

There is no *per se* rule against tentative class certification. On the contrary, the courts have uniformly sustained tentative certification. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982), *cert. denied*, 104 S.Ct. 77 (1984); *Girsch v. Jepson*, 521 F.2d 153, 155 (3d Cir. 1975); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 174-178 (5th Cir. 1979); *Patterson v. Stovall*, 523 F.2d 108, 110-113 (7th Cir. 1976); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 639 (N.D.Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981); *Johnston v. Mid-Atlantic Toyota Distributors, Inc.*, 564 F.Supp. 1379, 1389-1391 (D. Md. 1983); *Arenson v. Board of Trade*, 372 F.Supp. 1349, 1353 (N.D. Ill. 1974); *In re Four Seasons Securities Law Litigation*, 58 F.R.D. 19, 32 (W.D. Okla. 1972), *rev'd on other grounds*, 502 F.2d 834 (10th Cir. 1974); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478-480 (S.D.N.Y. 1984) ("If the settlement agreement is found to be fair, reasonable and adequate-both in its substantive provisions and in the process of

its creation-then the policy reasons behind the Manual's admonition become inapplicable"). Petitioners cite no cases holding otherwise.

(c)

The Court of Appeals stated, in respect of the enlarged class, that all members of the Associations "benefited from having the opportunity to purchase insurance from a carrier selected by competitive bidding as well as from the reorganization of the Associations' structure" and, accordingly, "the interests of the members of the broadened class in the settlement agreement were commonly held, and there is therefore no basis for disturbing the District Court's finding on adequacy of representation." (13a) Upon the merits, such decision of the Court of Appeals is incontestably correct and raises no issue worthy of certiorari.

Respecting the settlement's bar of derivative claims, the Court of Appeals pointed out that petitioners "have failed to utilize the opportunity afforded by this court's previous remand to produce 'cogent factual objections' to the foreclosure of derivative damages claims on behalf of the Associations." (17a) The Court of Appeals also pointed out that the payment of over $11 million by CPG to the Associations was obtained in the settlement (18a, n. 4) and, further: "the very nature of a derivative claim largely mitigates whatever threat may be posed by the settlement's foreclosure of...[derivative claims] because the nearly 3,000 members of the Associations who have opted out of the current lawsuit remain eligible...[to sue derivatively]. It is perhaps significant, however, that as yet no one has attempted such a derivative action." (18a).

B. *Petitioners' Contention That The Settlement Is Tainted Because Class Counsel Negotiated Their Fee Before And During Settlement Negotiations Is Erroneous As A Matter Of Fact And, Moreover, Is Without Merit As A Matter Of Law*

Petitioners' contention that the settlement is tainted rests *upon the factual assumption* that class counsel negotiated their fee before and during the settlement negotiations. Such factual assumption is contrary to the determinations of both the Court of Appeals and the District Court, the Court of Appeals stating, after a careful and considered review of the question (22a-24a), that they "find no reason to disturb the District Court's determination that the conduct of the parties leading to agreement on attorneys' fees was proper." (24a)

The foregoing is a discretionary determination by the District Court unique to this case, affirmed by the Court of Appeals after meticulous examination of the record. It is clearly not an important question of federal law which should be reviewed by this Court on a writ of certiorari.

Moreover, as held by the Court of Appeals, petitioners' contention that the settlement is tainted is without merit as a matter of law. In *Prandini v. National Tea Co.*, 557 F. 2d 1015, 1020 (3d Cir. 1977), upon which petitioners rely, the Third Circuit held that defendants should not have engaged in fee negotiations with plaintiffs, since the only question involved in those negotiations was how much of the settlement fund should be allocated to attorneys' fees, a question concerning which defendants had no legitimate interest of their own to negotiate. Here, in contrast, the discussion between the parties concerned the payment of attorneys' fees alone, which defendants did have a legitimate interest in discussing because the amount of such attorneys' fees, unlike *Prandini*, would affect how much money defendants would pay.

Thus, in its subsequent decision in *Shlensky v. Dorsey*, 574 F. 2d 131, 150 (3d Cir. 1978), the Third Circuit refused to require that negotiation of the damage aspect of the settlement

precede negotiation of attorneys' fees, stating that defendant "is not in a position of indifference...to the amount which it must pay the plaintiffs' attorneys for fees and expenses." The Court of Appeals in its opinion below cited *Shlensky* and recognized the foregoing vital distinction between this case and *Prandini* (24a-25a, 26a-27a).

This case has nothing in common with *Jeff D. v. Evans*, 743 F.2d 648 (9th Cir. 1984), *cert. granted*, ____ U.S. ____, 105 S.Ct. 2319 (1985) (No. 84-1288). In *Jeff D.*, the district court declined to award attorneys' fees in a civil rights action because defendants had conditioned their settlement upon plaintiffs' waiver of fees. On appeal, the Ninth Circuit faulted the district court for ratifying the terms of the settlement agreement under which plaintiffs waived attorneys' fees, without "mak[ing] its own determination of the fees that are reasonable, giving due consideration to the approrpiate factors." *Id.*, 743 F.2d at 652. In this case, by contrast, both the District Court and the Court of Appeals independently evaluated the amount that should be awarded to plaintiffs as attorneys' fees (26a-28a, 67a-73a).

Moreover, the problem underlying *Jeff D.* -- the simultaneous negotiation of attorneys' fees and the terms of the settlement on the merits which resulted in a waiver of attorneys' fees contrary to the policy in favor of the enforcement of Civil Rights cases -- is not present here. Further, the District Court in this case specifically found as a matter of fact that "the amount of the fee application was *not* negotiated as agreed upon until after the main substantive terms of the settlement were arrived at" (72a, emphasis added). That factual finding was affirmed by the Second Circuit (24a). Thus, petitioners' claim that the decisions rendered by the courts below conflict with the decisions of other courts rests entirely upon the false premise that there was simultaneous negotiation of settlement fees and substantive terms.

Nor are petitioners' correct when they assert that four circuits have disapproved settlements in which simultaneous negotiations occurred. In one of the cases petitioners cite -- *Pettway v.*

American Cast Iron Pipe Co., 576 F.2d 1157, 1216 n. 71 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) -- the court found that the "record . . . does not indicate that such simultaneous negotiations actually took place." The court in *Pettway* therefore had no occasion to rule on the propriety of simultaneous negotiations. In another of the cases that petitioners cite -- *Mendoza v. United States*, 623 F.2d 1338, 1352-1353 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) -- the court not only declined to adopt a *per se* rule prohibiting simultaneous negotiation, but approved a class action settlement even though plaintiffs' counsel had negotiated the amount of attorneys' fees at the same time that he negotiated the substantive terms of the settlement.

In a third case cited by petitioners -- *Obin v. District Nine, International Association of Machinists*, 651 F.2d 574, 582 (8th Cir. 1981) -- the court did not even consider the question of simultaneous negotiation. The issue before the court in *Obin* was whether an application for attorneys' fees in an action, which was neither brought on behalf of a class nor settled, had to be made within the 10-day period governing motions to amend to alter judgments. The only other case that petitioners cite on the issue of simultaneous negotiations is *Prandini v. National Tea Co.*, *supra*, which is inapposite here as has been just discussed. *Compare Shlensky v. Dersey*, *supra*.

C. *The District Court Did Not Abuse Its Discretion In Determining That Petitioners Had Failed To Make "Cogent Factual Objections" Sufficient To Justify The Unlimited Discovery And Evidentiary Hearing That Petitioners Sought For The Purpose Of Relitigating This Entire Case De Novo*

The petition makes the generalized claim that petitioners are entitled to apparently unlimited discovery and an evidentiary hearing. However, petitioners ignore the voluminous record before the District Court, consisting of more than 100,000 pages of documents, lengthy answers to interrogatories, 66 days of deposition testimony, 869 pages of testimony -- and 124 exhibits -- produced in the settlement hearings before the state court Referee, the findings of the Referee, and affidavits of counsel.

Instead, petitioners sought to relitigate the entire case *de novo* with unlimited discovery (document and interrogatory discovery followed by depositions) (*See*, Objectors' memorandum dated July 7, 1983 in District Court, pp. 57-58.) They even urged the Court "to designate pursuant to Rule 706, F.R. of Evidence and Rule 23 several court-appointed experts to assist in evaluating the evidence which is developed [by petitioners upon discovery], particularly in determining the best possible damage recovery which could have been achieved" (*Id.* at p. 58) More than this, petitioners would require the proponents of the settlement [respondents herein] to pay all such experts. (*Id.*, at p. 58)

The District Court made the discretionary determination, affirmed by the Court of Appeals, that it had "sufficient materials already before it to evaluate the settlement" and, further, that petitioners had "failed to make cogent factual objections which indicate the need for discovery and a possible evidentiary hearing" (73a).

As shown by the opinions below, these determinations were not an abuse of discretion.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: New York, New York
October 19, 1985

Respectfully submitted,

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